APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 74-1276 and 74-1277

United States of America,
Plaintiff-Appellee,

v.

Finis P. Ernest, Inc. and Modern Asphalt
Paving and Construction Co.,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern
District of Illinois—No. Cr. 73 66 E
James L. Foreman, Judge

Argued November 8, 1974—Decided January 29, 1975

Before MARIS* and HASTINGS, *Senior Circuit Judges*, and TONE, Circuit Judge.

HASTINGS, *Senior Circuit Judge*. Defendants Finis P. Ernest, Inc. (Ernest) and Modern Asphalt Paving and Construction

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* Senior United States Circuit Judge Albert Branson Maris of the Third Circuit is sitting by designation.

Co. (Modern) were indicted under a single count indictment for violation of the Sherman Act, 15 U.S.C. § 1, for a combination and conspiracy to submit collusive, non-competitive and rigged bids to the City of East St. Louis, Illinois, for a city sanitary sewer project. The case was tried to a jury, the Honorable James L. Foreman, Judge, presiding, and the jury found both defendants guilty. The court denied all of defendants' post-trial motions and imposed fines of $35,000 and costs on Ernest and $15,000 and costs on Modern.

Defendants raise three issues in this appeal:

(1) Whether there was sufficient evidence to prove the jurisdictional requirement of a restraint of interstate commerce;

(2) Whether the evidence was sufficient to prove a conspiracy between the defendants to rig bids; and

(3) Whether the court erred in admitting evidence showing that Modern had insufficient funds in its checking account to cover the check which it submitted to the city with its bid.

Jurisdiction

The Sherman Act, 15 U.S.C. § 1, states: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ." The Supreme Court has recently reiterated that jurisdictional inquiry under this general language requires a particularized judicial determination which must turn on the circumstances presented in each case. *Gulf Oil Corp. v. Copp Paving Co.*, . . . U.S. . . ., 43 U.S.L.W. 4059, 4062 fn. 12 (Dec. 17, 1974). See also *Rasmussen v. American Dairy Association*, 9 Cir., 472 F.2d 517, 526-527 (1972), *cert. denied*, 412 U.S. 950 (1973).

In the instant case, the government introduced evidence that materials used by Ernest in construction of the sanitary sewers were manufactured outside the State of Illinois. Clay sewer pipe manufactured in Indiana and manhole frames and covers manufactured in Wisconsin were purchased from Sidener Supply Company in Illinois. A sewer pumping station was purchased from Davco Manufacturing Company in Georgia. The cost of these items was approximately $9,307. The project was built under contract with the City of East St. Louis with funds supplied by the United States Department of Housing and Urban Development (HUD). In February, 1971 HUD approved $300,000 for public improvements, primarily sewer construction. In October 1971, after the city had had to reject bids for sanitary and storm sewer construction because they substantially exceeded the engineer's estimate, the city requested an additional $300,000 for these projects and the increase was approved by HUD in February 1972. The question is whether these facts and the inferences which may be drawn therefrom satisfy the jurisdictional requirement of the Sherman Act.

In determining whether particular circumstances constitute a "restraint of trade or commerce among the several states" courts have taken differing approaches. See, for example, Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 Fed.B.J. 282 (1965); Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U.L.Rev. 323 (1974). Problems of interpretation seem to be due in large part to the fact that the "single cryptic phrase defines both the conduct prohibited by the Act and the statute's jurisdictional reach." *Rasmussen v. American Dairy Association*, 9 Cir., 472 F.2d 517, 521 (1972), *cert. denied*, 412 U.S. 950 (1973).

Our problem of interpretation is whether the elements of restraint and interstate commerce may be satisfied separately or whether jurisdiction requires that the restraint be upon the interstate commerce. In several recent cases the Court of Appeals

for the Ninth Circuit has viewed the question of jurisdiction under the Sherman Act as entirely one of constitutional power: whether defendants' conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress. *Gough v. Rossmoor Corp.*, 9 Cir., 487 F.2d 373, 376 (1973); *In re Western Liquid Asphalt Cases*, 9 Cir., 487 F.2d 202 (1973), *rev'd in part sub. nom. Gulf Oil Corp. v. Copp Paving Co.*, ... U.S. ..., 43 U.S.L.W. 4059 (Dec. 17, 1974). *See also Ford Wholesale Co. v. Fibreboard Paper Products Corp.*, 9 Cir., 493 F.2d 1204, *cert. denied*, ... U.S. ..., 43 U.S.L.W. 3212 (1974).[1]

The analysis of *In re Western Liquid Asphalt Cases* is illustrative of this approach. The Ninth Circuit's decision there on the issue of Sherman Act jurisdiction was unaffected by the Supreme Court's decision in the case reported as *Gulf Oil Corp. v. Copp Paving Co.*, ... U.S. ..., 43 U.S.L.W. 4059 (Dec. 17, 1974), since the Court had limited its grant of certiorari to the questions of jurisdiction under the Clayton and Robinson-Patman Acts.[2] In that case the dispute concerned asphaltic concrete which was produced in California and delivered to construction sites in California only. The Court of Appeals held that jurisdiction under the Sherman Act was satisfied because the "production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law." 487 F.2d at 204. The court's bifurcated analysis made it unnecessary in deciding the question of jurisdiction to consider whether any interstate commerce was allegedly restrained. This approach,

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[1] See the discussion of Sherman Act jurisdiction in *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Assn.*, 7 Cir., 484 F.2d 751, 755-759 (1973), *cert. denied*, 414 U.S. 1131 (1974).

[2] But see the comment of Mr. Justice Douglas that the Court's holding might result in a different determination of the Sherman Act question on remand. 43 U.S.L.W. at 4066 n.6 (Douglas, J., dissenting).

which widens the reach of the Act, finds some support in decisions of the Supreme Court which emphasize that Congress in the Sherman Act intended to exercise the full extent of its constitutional authority under the Commerce Clause. *See, e.g., Gulf Oil Corp., supra* 43 U.S.L.W. at 4062; *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945); *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 557-559 (1944); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940).

In situations such as the instant case, which involve *per se* violations of the Act, there is an additional reason for not requiring proof of an adverse impact on interstate commerce to satisfy the jurisdictional requirement. A *per se* violation is activity, such as price fixing, for which effects need not be shown to establish the substantive offense. Restraints in this category "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). Where activity falls within one of these classes of restraints it is "not for the courts to decide whether in an individual case injury had actually occurred" in determining whether there has been a substantive violation of the Act. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). It may be anomalous to require proof of effects to satisfy jurisdiction in those cases where proof of effects is not necessary to establish the substantive offense. See *P. Areeda, Antitrust Analysis* § 178 (1967).

The alternative approach to Sherman Act jurisdiction which considers the nexus between restraint and interstate commerce is supported by other circuits decisions of the Ninth Circuit, decisions in other circuits, as well as by other language of the Supreme Court.

The jurisdictional analysis in *Page v. Work*, 9 Cir., 290 F.2d 323 (1961), seems inconsistent with the Ninth Circuit's most recent decisions, yet *Page* continues to be cited with approval in those cases. In *Page*, the complaint alleged that the defendants eliminated competition in legal advertising in Los Angeles County. The court noted that the defendant newspapers bought newsprint from outside the state, carried some national news and advertising and had some out-of-state subscribers. The court nevertheless concluded that since the claimed restraints were "on a purely local level and were wholly directed to [the] local intrastate market," 290 F.2d at 330, the jurisdictional requirement of the Sherman Act was not satisfied. The court said, "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." 290 F.2d at 330. In distinguishing a group of other newspaper cases the court said further, "[i]n all the above cases a restraint of interstate commerce was found which was determinative of federal jurisdiction." 290 F.2d at 331. There is no question in *Page* that the locus of the restraint was a consideration in determining jurisdiction. *See also, Sun Valley Disposal Co. v. Silver State Disposal Co.*, 9 Cir., 420 F.2d 341 (1969).

Other courts have also found jurisdiction absent where interstate activities were alleged where there was no showing that the restraint operated on the interstate commerce. *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 5 Cir., 469 F.2d 416 (1972); *Lieberthal v. North County Lanes, Inc.*, 2 Cir., 332 F.2d 269 (1964); *Elizabeth Hospital, Inc. v. Richardson*, 8 Cir., 269 F.2d 167, *cert. denied*, 361 U.S. 884 (1959); *Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc.*, 316 F. Supp. 1045 (D. Minn. 1970).

The Supreme Court has never decided the question of whether a business with out-of-state activities which engages in a local conspiracy to restrain commerce falls within the jurisdiction of

the Sherman Act even though there is no restraining effect on interstate commerce. In deciding related questions, however, the Court has used language which might suggest that an interstate restraint is required for jurisdiction.

In a landmark case holding that a locally applied restraint came within the purview of the Act if the result was to restrain interstate commerce, the court stated the jurisdictional issue like this: "We first should be satisfied that the activities on which restraints are alleged to have been exerted constitute commerce among the states." *United States v. Women's Sportswear Manufacturers Association*, 336 U.S. 460, 461 (1949). The Court went on to explain that whether defendants were engaged in interstate commerce was not determinative.

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. 336 U.S. at 464.

In its recent decision in *Gulf Oil Corp., supra*, the Supreme Court quoted this language from *Women's Sportswear* and briefly reviewed, in dicta, the jurisdictional requirement of Section 1 of the Sherman Act. The Court said, "The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods." 43 U.S.L.W. at 4062. After noting that Section 1 was designed to utilize the full extent of the constitutional power under the commerce clause, the Court went on to state that a local contract, combination or conspiracy "may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce." *id.*

The possibility that an adverse effect upon interstate commerce is a jurisdictional requirement is also suggested by lan-

guage in earlier decisions of the Court. *See, e.g., United States v. Employing Plasterers Association*, 347 U.S. 186, 188 (1954); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234, 238-239 (1948).

Thus, there is substantial support for both responses to the question of whether Sherman Act jurisdiction requires proof of a restraint on interstate commerce. We need not resolve that issue here, however, because we are convinced that there is sufficient evidence in this case to support a finding of jurisdiction under either approach.

Under the first approach we need only find that the restraint is sufficiently related to commerce that Congress has jurisdiction to act. Here, alleged bid rigging enabled Ernest to obtain the city sewer contract and in performing that contract it used approximately $9,307 worth of materials obtained in interstate commerce. This relationship is sufficient to assure that application of the Sherman Act to this case is not beyond the constitutional authority of Congress. Where a *per se* restraint is involved, the quantity of interstate commerce is unimportant. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310 (1956); *United States v. Bensinger Co.*, 8 Cir., 430 F.2d 584, 588 (1970).

If, however, proof of a restraint of interstate commerce is required for jurisdictional purposes, there are sufficient facts to warrant such a finding. Although there was evidence that the price of $9,307 worth of materials was not affected by the alleged bid rigging since the sellers charged their standard prices for the items sold, there is still evidence to support inferences that the defendants' activity had a restraining effect upon interstate commerce.

The restraint potentially reduced competition in materials in interstate commerce. If there had been genuine competitive bidding, each contractor, in an effort to make the lowest bid,

would have obtained competitive prices from materials suppliers. The effect of the restraint was that neither Ernest nor Modern had any incentive to obtain competitive prices from out-of-state suppliers.

Further, where bids are rigged, the price the city will have to pay for the project is artificially increased. The disparity between the bids and the city engineer's lower estimate of the cost of the project is some evidence that the effect of the defendants' activity was to increase the city's cost for the project. Increasing the city's cost restrains interstate commerce in at least two ways. First, funds for the project came from HUD and its appropriation to the city had to be increased after the bid, higher than the engineer's estimate, was received. HUD funds are transferred in interstate commerce. An increase in the amount of money required for this project would inevitably mean that there would be less money available for HUD projects elsewhere in the United States. Second, where the city must use more of its available funds to complete the sewer project it will have less money to expend for other projects requiring use of goods shipped in interstate commerce.

We therefore hold that there was sufficient evidence introduced at trial to satisfy the jurisdictional requirement of the Sherman Act.

Sufficiency of the Evidence

Appellants argue that the evidence at trial was insufficient to prove that defendants conspired to rig bids for the city sewer construction project. It is not for an appellate court to weigh the evidence or determine the credibility of witnesses. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. . . . Participation in a criminal conspiracy need not

be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' " *Glasser v. United States*, 315 U.S. 60, 80 (1942). Where the evidence is circumstantial it is not necessary that it be such as to exclude every reasonable hypothesis other than that of guilt. As with direct evidence, it is only necessary that the jury be convinced of guilt beyond a reasonable doubt. *Holland v. United States*, 348 U.S. 121, 139-140 (1954).[3]

Our review of the evidence in the light most favorable to the government indicates that it was sufficient to prove that the defendants conspired to submit collusive bids to the City of East St. Louis.

Bids for the sanitary sewer project were first let on January 30, 1971. Ernest's bid was rejected because it was the only bid submitted for that project and because it substantially exceeded the city engineer's estimate for the cost of the job.

The sanitary sewer job was put up for rebidding on August 6, 1971. This time, only Ernest and Modern submitted bids. Ernest was awarded the contract. The bids were submitted in the form prescribed by the city which called for the listing of sixteen unit prices. Each unit price was to include all labor, materials, overhead, profit, insurance and all other costs required to cover the finished work. Although materials costs might sometimes be standardized, there were no standard prices for unit prices such as these including so many uncertain variables. Nevertheless, in the bid submitted by Modern seven of the sixteen unit prices were identical to those in the Ernest bid. For each of the other nine unit prices, the bid submitted by Modern

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[3] *Cf. United States v. McCarthy*, 7 Cir., 196 F.2d 616, 619 (1952), decided by our court prior to the decision in *Holland*. While other courts of appeals have since rejected, in light of *Holland*, the rule of circumstantial evidence followed in *McCarthy*, our court has not previously had occasion to reconsider the issue. See *United States v. Currier*, 1 Cir., 454 F.2d 835, 838, 838 n.6 (1972).

was slightly higher than Ernest's bid. The differences in the prices on those items suggest that unit prices of the Modern bid had been arrived at by making simple changes in the unit prices from the Ernest bid. For example, Ernest's unit price for the first item, laying eight inch sewer pipe at depths of from six to nine feet, was $12.19, while Modern's bid was $13.19. Modern's bids on seven of the unit prices could have been the result of merely rounding off Ernest's bids for those items. For example, Ernest's bid for item three was $33.42 and Modern's was $33.50. The pumping station price on the Modern bid had been altered on the form from $49,050 to $50,550 so as to suggest that it had been deliberately changed to be higher than the Ernest price of $49,750.

There was other evidence that the Modern bid was not a serious one and was submitted so that there would be an appearance of competitive bidding. Modern's bid had been prepared on the morning the bids were due by one of its employees working at home without anyone's assistance. No one from Modern inspected the work site or contacted any suppliers.

There were also indications that Modern did not believe it could get the sewer job. It had submitted bids on other contracts which, when combined with this contract, would have committed Modern to construction jobs beyond the amount for which it could obtain a performance bond. Further, it did not appear that Modern expected the city to cash its check submitted with its bid because its checking account did not contain sufficient funds to cover the check.[4]

The government also showed that the two companies would have had an opportunity to agree upon a collusive bid because

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[1] Although appellants claim that it was error to admit evidence concerning the checking account, as we discuss *infra*, we find the evidence was properly admitted.

during the summer when the bids were submitted they were working together on a driveway project.

We find that there was substantial evidence to support the jury's verdict.

Admission of Evidence

Finally, appellants argue that it was error to admit testimony of a bank cashier and Modern's bank statements indicating that there were insufficient funds in its checking account to cover the full amount of Modern's bid check. Appellants object to the evidence as irrelevant, improper rebuttal testimony, and impeachment on a collateral matter. The trial court held the evidence admissible and relevant to the question of the seriousness of Modern's bid. We agree.

Appellants contend that the evidence was in the nature of impeachment and collateral to any issue in the case. Impeachment is an attack upon the credibility of a witness. A witness' testimony may be contradicted without being impeached. *United States v. Williamson*, 5 Cir., 424 F.2d 353, 355 (1970). Here, the evidence was admissible for a purpose other than impeachment. Modern had introduced evidence to attempt to establish that its bid for the sewer job was a serious one despite the fact that it had not submitted a certified check as required by the bid specifications. The government in rebuttal introduced the evidence of insufficient funds in an attempt to demonstrate that the check was not indicative of a serious bid. The function of rebuttal is to explain, repel, counteract or disprove the evidence of the adverse party. *United States v. Mallis*, 3 Cir., 467 F.2d 567, 569 (1972); *United States v. Crowe*, 7 Cir., 188 F.2d 209, 213 (1951). There was no abuse of discretion in admitting the evidence in rebuttal.

The convictions appealed from are, in all respects, affirmed.

Affirmed

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In the United States District Court
For the Eastern District of Illinois

United States of America,

v.

Finnis P. Ernest, Inc.; and Modern Asphalt Paving and Construction Co.,

Defendants.

Criminal Action No. 73-66-E

Filed: .....

INDICTMENT

The Grand Jury charges:

I

The Defendants

1. The corporations named below are hereby indicted and made defendants herein. Each of said corporations is organized and exists under the laws of the state indicated and has its principal place of business in the city indicated. Within the period of time covered by this indictment, these defendants have engaged in the business of construction in the City of East St. Louis, Illinois.

Corporation	State of Incorporation	Principal Place of Business
Finis P. Ernest, Inc.	Delaware	East St. Louis, Illinois
Modern Asphalt Paving and Construction Co.	Delaware	East St. Louis, Illinois

II

Co-Conspirators

2. Various persons not made defendants in this indictment have participated as co-conspirators in the offense hereinafter charged and have performed acts and made statements in furtherance thereof.

III

Definitions

3. As used herein:

(a) "Sanitary sewers construction" means the installation of sewer pipe, sewage pumping stations, manhole frames, manhole covers, joints, valves and other related material necessary for the transmission of domestic wastes, sewage, waste water and other effluents.

(b) "Urban renewal area" means a slum area, a blighted deteriorated area which the Secretary of the United States Department of Housing and Urban Development has approved as appropriate for an urban renewal project.

(c) "Urban renewal project" means the undertakings and activities of a local urban renewal agency within an urban renewal area for the elimination of the development or spread of slums and blight.

(d) "Project improvements" means the installation and construction of public improvements as part of an urban renewal project within an urban renewal area which are necessary for carrying out the objectives of the urban renewal.

IV

Trade and Commerce

4. In 1959, the Federal Government awarded approximately $1.7 million to the City of East St. Louis, Illinois to finance an urban renewal project within an urban renewal area. This urban renewal project included survey and planning, land acquisition, demolition and site clearance, relocation, project improvements and other activities necessary to develop the urban renewal area.

5. In February 1971, the United States Department of Housing and Urban Development (hereinafter referred to as "HUD") approved $300,000 for the project improvements portion of this urban renewal project. These project improvements consisted primarily of excavation, street and storm sewers construction and sanitary sewers construction.

6. In June 1971, the City of East St. Louis advertised and received bids for these project improvements, including a separate bid for sanitary sewers construction. In June 1971, the City of East St. Louis rejected the bids tendered for these project improvements and re-advertised a second bid invitation for the project improvements. On August 6, 1971, the City of East St. Louis again received bids for these project improvements, including separate bids from the corporate defendants for the sanitary sewers construction. Shortly thereafter in August 1971, the City of East St. Louis awarded the sanitary sewers construction job to the defendant Finis P. Ernest, Inc., on the basis of its low bid.

7. In October 1971, the City of East St. Louis requested an additional $300,000 grant from HUD for said project improvements. In February 1972, HUD approved the City of East St. Louis' request for the $300,000 increase for project improvements.

8. Sanitary sewers construction requires, among other things, the following materials: sewer pipe, manhole frames, manhole covers, and a sewage pumping station. Sewer pipe, sewage pumping stations, manhole frames, manhole covers, and other materials are produced in and/or distributed from states other than Illinois and shipped into the State of Illinois for use in sanitary sewers construction, including such construction performed pursuant to urban renewal project improvement contracts of the City of East St. Louis.

V

Offense Charged

9. Beginning sometime prior thereto, the exact date being unknown to the grand jurors, and continuing thereafter up to at least August 6, 1971, the defendants and co-conspirators have entered into and engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in sanitary sewers construction, in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

10. The aforesaid combination and conspiracy consisted of an agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to submit collusive, non-competitive and rigged bids and price quotations to the City of East St. Louis on August 6, 1971, for sanitary sewers construction in connection with urban renewal project improvements.

11. In furtherance of the aforesaid combination and conspiracy, the defendants and co-conspirators by agreement, understanding, and concert of action did the things which, as hereinbefore charged, they combined and conspired to do.

VI

Effects

12. The combination and conspiracy had the effect of:

(a) Fixing, at an artificially high and non-competitive level, the price of sanitary sewers construction in connection with the urban renewal project improvements contract awarded by the City of East St. Louis in August 1971.

(b) Suppressing and restraining competition in urban renewal sanitary sewers construction in the City of East St. Louis.

(c) Denying the City of East St. Louis the right to receive competitive sealed bids, in free and open competition, for sanitary sewers construction in connection with its urban renewal project improvements.

VII

Jurisdiction and Venue

13. The aforesaid offense was carried out in part within the Eastern District of Illinois within five years preceding the return of this indictment.

MICHAEL L. LEVINSON
Assistant United States Attorney

A True Bill

/s/ JOE D. TURNER
Foreman

/s/ THOMAS E. KAUPER
Assistant Attorney General

/s/ BUDDIA J. RASHID

/s/ ROBERT B. HUMMEL
Attorneys, Department of Justice
HENRY A. SCHWARZ
United States Attorney

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 25, 1975

Before
Hon. John S. Hastings, Sr. Circuit Judge
Hon. Albert B. Maris, Sr. Circuit Judge
Hon. Philip W. Tone, Circuit Judge

Nos. 74-1276, 74-1277.

United States of America, Plaintiff-Appellee, vs. Modern Asphalt Paving and Construction Company, Finis P. Ernest, Inc., Defendants-Appellants.	Appeal from the United States District Court for the Eastern District of Illinois, East St. Louis Division. (73 66 E)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be, and the same is hereby, Denied.

Petition for Rehearing Denied February 25, 1975.

APPENDIX D

June 10, 1975

Appeal No. 74-1277

United States of America,
Plaintiff-Appellee,

vs.

Finis P. Ernest, Inc.,
Defendant-Appellant.

AFFIDAVIT

I, Thomas F. Strubbe, being duly sworn under oath, depose and state as follows:

1) I am the Clerk of the United States Court of Appeals for the Seventh Circuit, located at Chicago, Illinois.

2) On April 26, 1974, the appeal of the defendant-appellant, Finis P. Ernest, Inc., was docketed in this Court as Appeal No. 74-1277. It was consolidated for oral argument and decision with the appeal of Modern Asphalt Paving and Construction Company, Appeal No. 74-1276.

3) On June 12, 1974, attorney Phillip A. Montalvo filed an appearance in this appeal on behalf of the aforesaid defendant-appellant, Finis P. Ernest, Inc. Briefs were filed and this appeal (together with No. 74-1276) was scheduled for oral argument on November 8, 1974. Notice of such oral argument was sent to all counsel of record on September 18, 1974. No notice was sent to attorney Edward Neville.

4) On November 1, 1974, a motion was filed in this Court to allow the withdrawal of previous counsel for the defendant-appellant. On November 8, 1974, an order was entered allow-

ing attorney Edward Neville to substitute as counsel for the defendant-appellant. No appearance was filed by attorney Edward Neville.

5) The oral argument of this appeal was held on November 8, 1974. On January 29, 1975, the opinion of this Court affirming the decision of the District Court for the Eastern District of Illinois was filed. Judgment was entered accordingly. On February 12, 1975, a petition for rehearing was filed on behalf of the defendant-appellant, Finis P. Ernest, Inc.

6) On February 25, 1975, an order was entered by this Court denying the petition for rehearing for Finis P. Ernest, Inc. The deputy clerk transmitting copies of this order to counsel took the names of the attorneys from the specified location on page 1 of our printed docket sheets. Because of the fact that attorney Edward Neville had not filed an appearance, he was not sent a copy of such order. Attorney Phillip A. Montalvo was. The deputy clerks have never been expected to read through the entire multiple-page docket sheets to ascertain the identity of counsel. It appears this could be a shortcoming in our system, unless we can demand that every attorney representing a client in this Court be required to file a formal appearance.

7) It is my understanding that, because of the foregoing, attorney Edward Neville was unable to file his petition for writ of certiorari in the Supreme Court of the United States in a timely manner. I am furnishing him with this "AFFIDAVIT" to explain the reason he was unable to do so. I can see no reason why Mr. Neville or, especially, his client should be penalized for our failure to transmit to him notice of the denial of his rehearing petition.

/s/ Thomas F. Strubbe
Clerk for the United States Court of
Appeals for the Seventh Circuit